(7)

FILED
JUL 28 19
CHARLES ELMORE CRO
CL

Supreme Court of the United States

October Term, 1945.

No. 148.

THE AIROLITE COMPANY and THE
VENTILOUVRE COMPANY, INC.,
Petitioners,

AGAINST

HARRY W. FIEDLER, doing business as AIR
CONDITIONING UTILITIES COMPANY,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

FREDERICK BREITENFELD,
J. PRESTON SWECKER,
Counsel for Respondent.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

October Term, 1945.

The Airolite Company and The Ventilouvre Company, Inc.,
Petitioners,

against

Harry W. Fiedler, doing business as Air Conditioning Utilities Company,
Respondent.

No. 148.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

This is an ordinary suit for patent infringement and unfair competition. There is no diversity of decisions; there is no public interest involved; and no novel question of law is presented.

The Alleged Patent Infringement.

The single patent in suit is No. 1,722,059, issued July 23, 1929 to one Andrew L. Riker and now owned by Petitioner The Airolite Company. It relates to a structure of well-known and purely mechanical character, comprising a rectangular frame and a series of louvers which are pivotally mounted for selective adjustment into "closed" and "open" positions. Each of the four claims of the patent is directed to minor structural details, claims 1 and 2 relating solely to the rectangular frame itself, claims 3 and 4 relating solely to an insignificant detail of the operating handle (Figures 8 and 9 of the patent) by means of which the louvers are pivotally adjusted.

Prior to trial, Petitioners withdrew their charge of infringement of claims 3 and 4.

Respondent set up the usual defenses of non-infringement and invalidity, and on the question of invalidity Respondent filed a counterclaim seeking a declaratory judgment (28 U. S. C. 400) to the effect that all four claims of the patent are invalid for lack of invention.

The trial Court held there was no infringement of claims 1 and 2, and declined to pass on the question of invalidity of any of the claims.

The Circuit Court of Appeals properly affirmed the judgment as to non-infringement, and held in addition that each of the claims is invalid for lack of invention, stating:

> "Both the first two claims which are directed to the structure of the frame and the last two covering the mechanism for operating the louvers deal only with minor changes from the prior art which were plainly so obvious and within the skill of an ordinary designer of the well known louver type ventilator that there was no invention in making them. The plaintiff failed to introduce any evidence of invention to support the presumption flowing from the grant of the patent and that was overcome decisively by the defendant's evidence."

The Circuit Court of Appeals subsequently denied Petitioners' application for rehearing.

There is nothing unusual in the facts involved, nor in the defenses set up by Respondent, nor in the proper ruling of both the Trial and Appellate Courts that Respondent has not infringed, nor in the ruling of the Appellate Court that the claims of the patent are invalid.

"Such an ordinary patent case, with the usual issues of invention, breadth of claims, and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent." *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314.

The Alleged Unfair Competition.

This charge is based solely on the allegation that certain specified illustrations in Petitioners' catalogues (designated "Detail 675", "Detail 45" and "Detail 170"; R. pp. 11, 12, 13) were copied by the Respondent and used by him in his catalogue (designated, respectively, Plans 502, 503 and 527, R. pp. 158, 159, 160). See Complaint, paragraphs 9 and 10 (R. pp. 4, 5) and Bill of Particulars, paragraph 4(b) (R. p. 10).

Respondent denied this charge and has consistently stressed that a mere comparison of Petitioners' illustrations with the alleged copies substantiates his contention that the charge of copying is unfounded.

The Circuit Court of Appeals sustained Respondent, holding that even if Petitioners' illustrations *had* been copied, no cause of action would have arisen. Neither the Petitioners' illustrations themselves, nor the catalogues in which they were published by Petitioners, are copyrighted; the articles depicted by the illustrations are unpatented, and are composed of well known structural elements freely usable by anyone; and the appearance of the products has acquired no secondary meaning.

The Circuit Court of Appeals said:

> "The defendant sold ventilators, not plans. At the most all he did was to sell ventilators repre-

> sented as his own in his own catalogue but illustrated by means of plans the trade would recognize as being plans made by the plaintiffs. We do not stop to consider whether, as the appellant contends, this finding lacked adequate support in the evidence for, if pushed to its extreme, it shows no more than that the defendant represented that he made and sold ventilators which were built according to the plans of the plaintiffs as he had the lawful right to do."

There is nothing unusual in the facts involved, and the ruling of the Circuit Court of Appeals was based upon well-established principles of law. Petitioners' charge of unfair competition was found by the Appellate Court to be wholly without merit, and was properly dismissed with costs.

Conclusion.

The ruling of the Court below is not in conflict with any decision of this Court, nor with any decision of any other Circuit Court of Appeals.

The case involves no principle whose settlement is of importance to the public.

The granting of a writ of certiorari is not warranted merely to review evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175.

The Petition is without merit and should be denied.

Respectfully submitted,

Frederick Breitenfeld,
J. Preston Swecker,
Counsel for Respondent.